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No. 93-411

In The

Supreme Court of the United States

October Term, 1993

GEORGE A. SCHLOEGEL AND THE HANCOCK BANK PROFIT SHARING PLAN,

Plaintiffs/Petitioners,

versus

LAURIE BOSWELL,

Defendant/Respondent,

versus

HANCOCK BANK, CHARLES EASTLAND, MARTHA PETERMAN, AND JOHN DOES 1 THROUGH 10,

Third Party Defendants/Petitioners.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's contention of a question for review under *Mertens v. Hewitt Associates*, ___ U.S. ___, 124 L.Ed.2d 161 (1993) is a specious "issue."

2. Whether the evidence was insufficient under settled legal standards to support Petitioner's claim of fiduciary status.

3. Whether the Court should expend judicial resources on a case in which the action of the Court of Appeals would also be mandated on other issues.

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RESPONSE TO PETITION FOR CERTIORARI

I.

THIS CASE DOES NOT PRESENT ANY ISSUE UNDER *MERTENS*.

The first question which Petitioner presents for review is whether *Mertens v. Hewitt Associates*, ___ U.S. ___, 124 L. Ed. 2d 161 (1993) constitutes an absolute bar to

claims for monetary damages against professional advisors to ERISA plans, regardless of the nature of the relationship between the advisor and the plan. This is a specious "issue" raised by Petitioner to create the impression of an issue appropriate for review by the Court where none exists.

Mertens did *not* leave unresolved the issue of when a professional advisor can be sued under ERISA. *Mertens* acknowledges that an advisor (or anyone else for that matter) can be sued under ERISA when he "cross[es] the line from advisor to fiduciary." ___ U.S. ___, 124 L.Ed.2d at 174.

The Fifth Circuit Court of Appeals acknowledged this holding and cited *Mertens* with approval (Slip Opinion at 5076). Respondent, too, agrees with this proposition and made no contrary argument either in the District Court or in the Court of Appeals.

II.

THE ONLY ISSUE IS THE INSUFFICIENCY OF THE EVIDENCE TO SUPPORT PETITIONER'S FIDUCIARY CLAIM

The only issue in this case is the sufficiency of the evidence to support Petitioner's claim that Respondent had "crossed the line" from advisor to fiduciary. Such an evidentiary issue on what the District Court itself described as "rare" set of facts (800 F. Supp. at 474) is not the type of issue on which this Court ordinarily grants a Writ of Certiorari. See *Layne v. Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923); *Smith v. Butler*, 366 U.S. 161 (1961).

Moreover, reviewing the record evidence as it was required to do, the Court of Appeals correctly concluded that the evidence was insufficient as a matter of law to establish a fiduciary capacity. In reviewing this issue, the Court of Appeals did not purport to make its own *de novo* findings of fact nor did it usurp the fact-finding function of the District Court. Instead, the Court of Appeals relied on *undisputed* facts. One of these critical undisputed facts was that the Plan Trustee Eastland had the duty to invest the Plan's funds and that it was Eastland who made the ultimate decision to purchase the life insurance policies in question (Slip Opinion at 5076). Petitioner's contrary argument is wholly erroneous.[1] Eastland's testimony was precisely as the Court of Appeals described it:

> Q. Who at the bank is ultimately responsible for investment decisions in the bank's profit sharing plan?
>
> A. The Trustee.
>
> Q. And who made the decision to purchase the New England Life policy in 1977?
>
> A. The ultimate decision, when I paid the premium, I did.

TR. 388.

The Court of Appeals did not, as claimed by Petitioner, adopt a test requiring that "a Plan participant has

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[1] Petitioner agrees with two of the other undisputed facts relied upon by the Court of Appeals, i.e., that Eastland wrote to a consultant in 1980 to solicit his independent advice on whether to use profit sharing funds to purchase life insurance and that most of the bank's top management rejected Boswell's insurance proposals.

no legal remedy unless he or she can show the (sic) that the alleged fiduciary is a person who is repeatedly referred to as a trustee or administrator of an employee benefit plan, and who signs documents and takes action regarding the plan in this assumed official capacity . . . " Petition at 35-36. Rather, the Court of Appeals examined each subsection of 29 U.S.C. §1002(21)(A), which defines the term "fiduciary". The Court of Appeals applied the facts of this case, properly found,[2] separately to each subsection of the statute.[3] In so doing, the Court considered

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[2] Petitioner creates an illusion of numerous contacts between Boswell and the profit sharing plan by intermingling throughout the Petition references to Boswell's contacts with the Bank's other insured employee benefit plans. However, as the Court of Appeals correctly gleaned from the record, Boswell's contacts with the profit sharing plan, the only plan at issue in this litigation, were minimal. Indeed, the record reflects only four such contacts in a period of more than twenty years: the sale of the policies in question in 1977 and 1980, an unsuccessful proposal for the sale of a policy in 1986, and Boswell's gratuitous response to Eastland's inquiry as to changes to the plan mandated by ERISA, made at the time Boswell had been retained to make similar changes to the pension plan.

[3] The Court of Appeals first considered the discretionary authority or control test of 29 U.S.C. §1002(21)(A)(i) upon which the District Court apparently premised its decision. Finding from the undisputed facts that "Boswell made an investment *proposal*, not an investment decision," the Court rejected fiduciary status under this subsection. (Slip Op. at 5076, emphasis in original). The Court then considered the investment advice test of 29 U.S.C. §1002(21)(A)(ii) and Department of Labor regulations, 29 C.F.R. §2501.3-21(c)(1), applicable thereto, neither of which had been considered by the District Court. Carefully analyzing the statute and regulations, the Court of Appeals concluded, as a matter of law, that Boswell did not cross the line to fiduciary status by rendering investment advice. (Slip Op. at 5076-78.)

relevant judicial authority of the Fifth Circuit Court of Appeals, of other Courts of Appeals and of the United States Supreme Court, finding them to be in harmony on all relevant points. Having conducted this thorough analysis, the Court of Appeals properly concluded that Laurie Boswell did not cross the line from advisor to fiduciary and, thus, that the District Court had erred in finding him to be an ERISA fiduciary.

III.

THIS COURT SHOULD NOT EXPEND VALUABLE JUDICIAL RESOURCES ON A CASE IN WHICH THE SAME RESULT IS MANDATED ON OTHER ISSUES

Even if the Court of Appeals had not reversed this case on the fiduciary status issue, it is clear that other issues would have required that the case be reversed and rendered. Most notably, the claims of the plaintiffs are clearly barred by ERISA's statute of limitations, 29 U.S.C. §1113, which bars claims as of the earlier of (1) six years after the date of the last action which constituted a part of the breach or violation or (2) three years after the earliest date which the plaintiff had actual knowledge of the breach or violation.

The Complaint in this case was filed on May 9, 1989. The breach or violation in this case may alternatively be argued to be either the sale of the policies of insurance in question or the payment of the insurance premium which violated the 50% rule. The policies in question were sold in 1977 and 1980. Further, the evidence in the case showed that the premium payment which brought the plan into violation of the 50% rule likewise occurred in

1980. Once this payment was made, the violation of the 50% rule was complete. It could not then be cured or mitigated by investigation, oversight or corrective action. Thus, six years later, during calendar year 1986, the claims of the plaintiffs became barred by the first subsection of 29 U.S.C. §1113. Likewise, the evidence showed that in 1980 the plan, which then possessed all applicable facts relating to the purchase of the policies, the payment of premiums and plan contributions, was specifically informed by Robert W. Dowd, an independent consultant, of the provisions of the 50% rule. Thus, in 1980, the plan had actual knowledge of the breach or violation. Three years later, during calendar year 1983, these claims were barred by the second subsection of the statute of limitations. Since the statute's bar arises upon the expiration of the *earlier* of the dates calculated under the two subsections of the statute of limitations, and since the application of *either* subsection of the statute would result in a finding that plaintiffs' claims are barred, it is clear that claims of the plaintiffs in this case are barred by the statute of limitations. *See generally, Meagher v. IAM Pension Plan,* 856 F.2d 1418 (9th Cir. 1988); *Fink v. National Savings and Trust Co.,* 772 F.2d 951 (D.C. Cir. 1985).

CONCLUSION

Respondent respectfully submits that this petition presents for review no questions of law left unresolved by *Mertens, supra* or any other applicable decision. Rather, this is simply a case in which the Court of Appeals correctly applied the undisputed facts to well-settled legal principles. This case presents no situation in which

the Court of Appeals has rendered a decision conflicting with the decision of another Court of Appeals or of the United States Supreme Court, has departed from accepted and usual course of judicial proceedings, has decided an important question of federal law which has not been but should be settled by the United States Supreme Court or which otherwise falls within the scope of matters considered by this Court under Rule 10. Respondent respectfully submits that the Petition for Writ of Certiorari should be promptly and summarily denied.

Respectfully submitted,

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